NO. 81107-5

SUPREME COURT OF THE STATE OF WASHINGTON

THERESA AMBACH and MICHAEL AMBACH, wife and husband, individually, and the marital community composed thereof,

Plaintiff-Respondents,

v.

H. GRAEME FRENCH, M.D. and JANE DOE FRENCH, individually and the marital community composed thereof; et al.,

Defendants-Petitioners.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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On Behalf of
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defense Trial Lawyers ("WDTL") is a nonprofit organization of attorneys who devote a substantial portion of their practice to representing defendants, companies, or entities in civil litigation. WDTL appears in this and other courts as *amicus curiae* on a pro bono basis to advance the interests of its members and their clients.

As *amicus curiae* in this case, WDTL will assist the Court by providing analysis of two pertinent and very distinct sets of laws: (1) those found in RCW 7.70, which exclusively govern actions for injuries arising from health care; and (2) those found in RCW 19.86, Washington's Consumer Protection Act. WDTL will also provide information regarding the real world implications for health care defendants in Washington if the erroneous Court of Appeals decision in this case is not reversed.

II. STATEMENT OF THE CASE

WDTL adopts Defendants-Petitioners' (collectively, "Dr. French's") Statements of the Case.

III. ARGUMENT

A. As a matter of public policy, RCW 7.70 provides the exclusive remedy for claims of injury arising out of health care.

In 1975, when RCW 7.70 was first adopted, it was widely understood that a medical malpractice insurance crisis was upon the

nation. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 148, 960 P.2d 919 (1998). This was a serious threat to the entire nation's health care system. *Id.*

In considering legislation that session, the Legislature had received the Washington State Bar Association's 1975 Medical Malpractice Report. *Id.* The report explained that insurance premiums for specified classes of physicians had doubled and tripled between 1972 and 1976. *Id.* It also noted that a major insurer had reported substantial increases in medical malpractice losses paid out between 1972 and 1974. *Id.* Based on this and other evidence before the Legislature at the time, this Court has acknowledged that it was rational to surmise that a medical malpractice insurance crisis either was upon Washington or was likely. *Id.*

In response to this urgent situation, the Legislature adopted the laws that were codified at RCW 7.70. *Sherman v. Kissinger*, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) (citing 1975-1976 Final Legislative Report, 44th Wash. Leg., 2d Ex. Sess., at 22). The primary goal of RCW 7.70 was to stem the crisis and the corresponding increase in consumer health care costs. *Id.*

Unfortunately, the crisis has not faded away. For example, in 2001, because of heavy medical malpractice losses and concerns about the future of these claims, the St. Paul Companies announced that they would

leave the medical malpractice insurance business. Milt Freudenheim, *St. Paul Cos. Exit Medical Malpractice Insurance*, N.Y. Times, December 13, 2001. This ended coverage for 750 hospitals, 42,000 physicians, and 73,000 other health care workers nationwide, including a fair number in Washington. *Id.* In 2003, the Office of the Insurance Commissioner placed an insolvent Washington Casualty Co. into receivership, at a time when it reportedly insured 46 Washington hospitals, 20 Washington community health clinics, and other Washington entities and physicians. *See* Thurston County Superior Court Cause No. 03-2-00401-1.

The crisis has continued. WDTL member attorneys often receive questions from consulting expert physicians in other states about why any physician would practice medicine in Washington. Indeed, there has been some migration of physicians away from Washington in response to Washington law and the continuing crisis. In 2006, in revising RCW 7.70, the Legislature declared:

> Access to safe, affordable health care is one of the most important issues facing the citizens of Washington state.... The rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them most.

Waples v. Yi, 146 Wn. App. 54, 61 n.3, 189 P.3d 813 (2008) (quoting Laws of 2006, ch. 8 § 1 (ellipses in original)). RCW 7.70 and its policies

and goals remain just as important today, and perhaps more so, than they were when the laws were originally passed over thirty years ago.

Enacted as part of the 1975 legislation, RCW 7.70.010 declares the Legislature's intent to modify substantive and procedural aspects of "all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care." Interpreting this section, the Court of Appeals has explained:

> This section sweeps broadly. It clearly states that RCW 7.70 modifies procedural and substantive aspects of *all* civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized.

Branom v. State, 94 Wn. App. 964, 969, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1023, 989 P.2d 1136 (1999) (emphasis in the original). Similar holdings have been reached in a variety of cases. *E.g., Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001); *Webb v. Neuroeducation, Inc.*, 121 Wn. App. 336, 346, 88 P.3d 417 (2004); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597 (1992); *Orwick v. Fox*, 65 Wn. App. 71, 86, 828 P.2d 12 (1992).

Accordingly, RCW 7.70 sets out the exclusive methods by which a plaintiff may pursue a claim for injuries arising out of health care against a physician such as Dr. French. The plaintiff may establish that the injury resulted from the health care provider's failure to follow the accepted

standard of care.[1] This is a typical medical negligence action. Alternatively, a plaintiff may prove that the health care provider promised that the injury suffered would not occur. This provision is seldom used. The final option is to show that the injury resulted from health care to which the patient did not consent. This is commonly labeled a "lack of informed consent" claim.

Reading RCW 7.70.010 and 7.70.030 together, Washington courts have held that it is clear that the three types of claims identified in RCW 7.70.030 are the only types of claims that can be pursued for injury as a result of health care in Washington. *Branom*, 94 Wn. App. at 969; *Orwick*, 65 Wn. App. at 85-86.[2]

The phrase "health care" is not defined in the chapter. However, for purposes of RCW 7.70, this Court has determined:

> Health Care is 'the process in which [a physician is] utilizing the skills which [the physician] had been taught in examining, diagnosing, treating or caring for the plaintiff as [the physician's] patient.'

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[1] RCW 4.24.090 and 7.70.040 define the standard of care that applies to physicians, hospitals, and others; it is "that degree of skill, care, and learning, possessed at the time by other persons in the same profession...."

[2] *But see Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005) (recognizing claim for medical battery when complete failure to obtain any consent at all).

Berger v. Sonneland, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) (quoting *Branom*, 94 Wn. App. at 969-70 (alteration in *Berger*)). These were precisely the skills Dr. French used here.

After Ms. Ambach had become one of Dr. French's patients, Dr. French examined her shoulder. He diagnosed her with a condition requiring surgical repair. He counseled her regarding alternative treatment options. He performed surgery on her. And then he provided follow up care to her. There can be no legitimate dispute that these activities fall squarely and unmistakably within the definition of health care above. They are fundamentally related to Dr. French's professional training and regulation as a physician and surgeon.

Consistent with the definition of health care in Washington, a plaintiff's claim that a physician performed unnecessary surgery is brought under RCW 7.70 as a claim for injury arising out of health care. *See, e.g., Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005) (physician recommended unnecessary removal of a portion of a patient's lung; pursued as a medical negligence claim). Ms. Ambach recognized this as well, and in fact pleaded a medical negligence claim in this case.[3]

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[3] Ms Ambach also pleaded an informed consent claim in this case. This was improper, as deviation from the standard of care and informed consent are alternative theories of liability. *E.g., Bays v. St. Luke's Hospital*, 63 Wn. App. 876, 881, 825 P.2d 319, *rev. denied*, 119 Wn.2d 1008, 833 P.2d 387 (1992). A physician cannot inform or warn about an alleged error unless and until the physician becomes aware of the error.

She also offered expert testimony that Dr. French's care deviated from the medical standard of care – this was fundamental personal injury, medical negligence testimony.

The testimony was consistent with the rule of RCW 7.70 that, absent extreme circumstances, expert testimony is required to prove a health care provider's breach of the standard of care. *E.g. Douglas v. Freeman*, 117 Wn.2d. 242, 249, 814 P.2d 1160 (1991) (citations omitted). This type of testimony is mandatory because medicine is complex, it is a learned science and art that must be studied for years before it is mastered, and it is beyond the knowledge of lay persons. *Harris v. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 663 P.2d 113 (1983).

By offering this testimony in support of both claims, Ms. Ambach essentially admitted that, regardless of what she labeled her claims, they were claims for injury arising out of the practice of medicine. In other words, she was making claims related to health care as it has been defined by this Court. As such, her claims were personal injury medical practice claims, governed exclusively by RCW 7.70. *See Wills v. Kirkpatrick*, 56

Id. However, even if the pleading by Ms. Ambach were proper, informed consent claims are health care claims within the meaning of RCW 7.70, and fall squarely within the framework of that chapter of the RCW. *Branom*, 94 Wn. App. at 970-71; *Villanueva v. Harrington*, 80 Wn. App. 26, 33-34, 666 P.2d 351 (1983) (expert testimony required to prove informed consent claim because only a physician or other qualified expert with appropriate medical knowledge is capable of determining the risks, benefits, and alternatives of medical procedures and the chances of occurrence).

Wn. App. 757, 761, 785 P.2d 834 (1990) (deviation from the standard of care and lack of informed consent are personal injury claims).

In addition to general damages, personal injury damages for RCW 7.70 claims include, among other things, medical expenses, loss of earnings, loss of use of property, cost of repair, loss of employment and loss of business or employment opportunities. WPI 30.01.02 (citing RCW 4.56.250(1)(a)). These personal injury damages are precisely the types of damages Ms. Ambach sought in this case.

B. As a matter of public policy, the Consumer Protection Act does not apply to personal injury actions or actions where professional error is alleged.

Personal injury claims and associated damages are not recoverable under the CPA. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 317, 858 P.2d 1054 (1993) (Personal injuries are not compensable damages under the CPA); *Hiner v. Bridgestone/Firestone*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999) (same); *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 336, 370, 773 P.2d 871 (1989) (same).

Claims grounded in the provision of professional services also are not recoverable under the CPA. *E.g., Haberman v. WPPSS*, 109 Wn.2d 107, 170, 744 P.2d 1042 (1987) (claims of negligence against

professionals not within scope of CPA); *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984) (provision of legal advice and services is outside the purview of the CPA as a matter of law); *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 166-67, 772 P.2d 1027 (1989) *rev. denied*, 113 Wn.2d 1005, 785 P.2d 431 (1990) (claims of "professional negligence or malpractice," i.e., claims of professional error, are exempt from CPA) (citing *Jaramillo v. Morris,* 50 Wn. App. 822, 826-27, 750 P.2d 1301 (1988)). Ms. Ambach concedes this point, noting that there is a "bright line distinction in claims" that precludes recovery under the CPA for errors in the rendering of professional services. Supp. Br. of Resp. at 5.

While Washington's CPA does not provide for recovery of personal injury claims or damages, and does not provide for recovery for claims of error in the provision of professional services, it does allow for very limited recovery against learned professionals. This limited recovery is available only for claims that arise out of the entrepreneurial aspects of the practice; put another way, it allows recovery for the business decisions made in connection with a medical practice. *See Short*, 103 Wn.2d at 61 (the "entrepreneurial aspects" are the "business aspects" of the practice).

> Entrepreneurial aspects do not include a doctor's skills in examining, diagnosing, treating, or caring for a patient.

Michael v. Mosquera-Lacy, slip op., ____ Wn.2d ____, ____ P.3d ____ 2009 Wash. LEXIS 73 (February 5, 2009) (reversing the Court of Appeals allowance of a CPA claim, based on lack of public impact). This Court's language defining what is excluded from actionable CPA entrepreneurial activities mirrors the definition of "health care" under RCW 7.70.

The CPA's preclusion of recovery for personal injury damages (which is the type of damages available for a health care claim made under RCW 7.70), together with its preclusion of recovery for claims arising out of health care make it unmistakable that Washington's public policy does not allow claims such as Ms. Ambach's, which are at their heart claims about personal injuries alleged to have occurred during the delivery of medical services to be pursued under the CPA.

C. The Court of Appeals erred in allowing Ms. Ambach to recast personal injury damages as property damages.

The Court of Appeals below acknowledged that the CPA is inapplicable to claims related to the competent practice of medicine. *Ambach v. French*, 141 Wn. App. 782, 787, 173 P.3d 941 (2007). Under RCW 7.70, core competencies for health care providers necessarily include complying with the standard of care and procuring informed consent prior to procedures. Therefore, even under the Court of Appeals' own understanding of the law as articulated in this case, Ms. Ambach's

claim should not have been allowed to go forward, because Ms. Ambach's claims are concerned with these core competencies.

Nevertheless, relying on *Quimby* and *Wright*,[4] the Court of Appeals ruled that, because Ms. Ambach might be able to show that Dr. French intentionally failed to provide appropriate information to secure informed consent, the CPA could be triggered. As Dr. French ably discussed in his briefing, neither *Quimby* nor *Wright* addressed the issue at hand in *Ambach*, namely what constituted property injury.[5] Moreover, the *Quimby* court appeared to fundamentally misunderstand the nature of an informed consent claim. As discussed above, an informed consent claim necessarily arises out of the physician's examining, diagnosing, treating or caring for the patient, the physician's provision of health care. As such, it falls outside of this Court's definition of entrepreneurial aspects in *Wright*. By its very nature, an informed consent discussion cannot be divorced from the professional practice of medicine.

In *Burnet v. Spokane Ambulance*, and in *Jaramillo v. Morris*, decisions that post-date *Quimby* but that were omitted from Court of

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[4] *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (1986); *Wright v. Jeckle*, 104 Wn. App. 478, 480, 16 P.3d 1268 (2001). *rev'd on other grounds*, 158 Wn.2d 375, 144 P.3d 301 (2006).

[5] In an effort to provide primarily supplemental materials in this *amicus curiae* brief, rather than reiterating arguments already made, WDTL notes simply that the referenced argument and Dr. French's other arguments are endorsed by WDTL. However, they will not be repeated in this brief.

Appeals decision below, the court appears to have recognized this. In *Burnet*, the plaintiff filed a medical malpractice claim, an informed consent claim, and a CPA claim against a neurologist and a hospital. The CPA claim alleged that a physician had held himself out as a pediatric neurologist, but was not board certified as such. *Burnet*, 54 Wn. App. at 166.

The *Burnet* court cited *Jaramillo*, where the court had dismissed a plaintiff's claim that a hospital was negligent in not properly screening a podiatrist and then allowing him to wrongly represent to the public that he was competent to perform certain surgeries. *Burnet*, 54 Wn. App. at 167 (citing *Jaramillo*, 50 Wn. App. at 826-27). The *Jaramillo* court determined that, even though there was an alleged deceptive practice at issue and the podiatrist was practicing medicine and performing surgery with the intent to earn money, this claim was a standard of care claim, not a claim about the entrepreneurial aspects of the practice of medicine. *Id.*

The *Burnet* court agreed with the *Jaramillo* rationale, and similarly concluded that the claims against the hospital did not implicate the entrepreneurial aspects of medicine, but instead were standard of care claims. The *Burnet* court specifically rejected the plaintiff's claim that the hospital's decision to grant privileges to the allegedly deceptive neurologist was made in order to draw a larger clientele to the hospital. *Id.*

That claim against the hospital was also a standard of care/provision of health care claim. *Id.*

These cases demonstrate that where the provision of health care makes up a component of the claim, the claim falls outside the purview of the CPA. This is true even if plaintiff alleges some misrepresentation during the course of the health care and attempts to recast the claim as a CPA violation. *See id.* Such a claim is simply a health care claim exclusively governed RCW 7.70. As discussed above, where the claim is a health care claim, the damages are personal injury damages, not property damages, and the Court of Appeals erred in holding otherwise in this case.

D. Other jurisdictions have rejected the extension of CPA liability to health care claims.

Courts in other jurisdictions have similarly rejected efforts to concoct a CPA claim to add on to a health care claim. For example, in *Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 699 A.2d 964 (1997), plaintiff was involved in a car accident in which she sustained serious injuries. *Id.* at 966. She alleged that the health care she received for her injuries was negligently provided. *Id.* She also alleged that the hospital had engaged in unfair and deceptive practices in violation of Connecticut's counterpoint to Washington's CPA. *Id.* This claim was based on an allegation that the hospital acted deceptively when it held itself out as a

major trauma center, because it was not staffed like one and the staff who were there were neither trained nor supported to the level of a major trauma center. *Id.*

The Connecticut Supreme Court analyzed this claim and determined that the level of staffing and qualifications of the staff was an issue related to the provision of medical services, should be treated as a medical practice claim, and did not give rise to a consumer protection claim. *Id.* at 974-75. In reaching that determination, the court considered the law of other jurisdictions. *Id.* It cited with approval the Michigan Court of Appeals' statement that:

> [CPA a]llegations that concern misconduct in the actual performance of medical services or the actual practice of medicine would be improper. We do not consider the legislature's use of "trade or commerce" in defining the application of the act to exhibit an intent to include the actual performance of medical service or the actual practice of medicine. If we were to interpret the act as such, the legislative enactments and well-developed body of law concerning medical malpractice could become obsolete

Id. at 974 (internal citations omitted). Ultimately, the Connecticut Supreme Court concluded:

> Medial malpractice claims recast as [CPA] claims cannot form the basis for a [CPA] violation. To hold otherwise would transform every claim for medical malpractice claim into a [CPA] claim.

Id. at 974. The concern expressed by the Connecticut Supreme Court is equally applicable in Washington, and was precisely the concern of the trial court in this case.

This conclusion is further supported by *Gorran v. Atkins Nutritionals*, 464 F. Supp. 2d 315, 328 (S.D.N.Y. 2006). There, the plaintiff sued, claiming that cardiovascular disease was caused by his following the Atkins' low carbohydrate diet. *Id.*

He alleged a consumer protection claim under Florida's consumer protection statute, which is similar to Washington's. *See id.* For "property damages," plaintiff sought recovery of the cost of his Atkins' diet book and $25 worth of Atkins' diet food. *Id.* The court saw through this tactic. It found that the thrust of plaintiff's complaint was the claim that he was misled into believing that the diet was safe, and that if he had not been misled, he would not have developed cardiovascular disease and its sequelae. *Id.* The lawsuit was not about the cost of the book or the cost of the food at all. The court correctly held that "the true damages that Gorran seeks are for personal injury, but such damages are not recoverable under the [consumer protection law]." *Id.*

Mr. Gorran's mischaracterization of his damages is no different than Ms. Ambach's mischaracterization of hers. Ms. Ambach asserted a

claim for personal injury damages. It is not for property damages, and it is not cognizable under the Washington CPA.[6]

E. The erroneous Court of Appeals decision opens up a floodgate of unintended consequences.

If the Court of Appeals ruling is allowed to stand, there is a very real potential that plaintiffs will tack improper CPA claims on to virtually every professional liability claim. In fact, after publication of the Court of Appeals decision, defense attorneys have reported an increased number of medical practice cases that include CPA claims. This is not a hypothetical risk. It is happening.

It is also valid concern in light of the fact that in order to satisfy the "unfair or deceptive acts" element of the CPA, no intent to deceive need be shown. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). This element of a CPA claim can be satisfied by merely showing that the action had the capacity to deceive a substantial portion of the public. *Id.* With that framework in

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[6] In contrast to concocted CPA claims like Ms. Ambach's, there are valid claims that could be brought against physicians under the CPA in the correct circumstances. For example, an insurance company may bring a CPA action against a physician for false billing and reports. *see State Farm & Cas. Co. v. Huynh*, 92 Wn. App. 454, 459, 962 P.2d 854 (1998); or, as in *Wright*, the physician was forcing his patients to purchase prescriptions medications from only himself. *Wright v. Jeckle*, 104 Wn. App. 478, 480, 16 P.3d 1268 (2001), *rev'd on other grounds*, 158 Wn.2d 375, 144 P.3d 301 (2006); however, the choice to prescribe the medication would be health care not subject to a CPA claim, but only under RCW 7.70.

mind, consider the litigation scenario that would arise in a hypothetical routine informed consent case:

A potential new patient was referred to a physician for a surgical consultation. If the patient elected to have surgery, the physician would continue to see the patient and would earn substantially more fees than if the patient elected not to have surgery.

During the consultation, the physician recommended surgery. She counseled the patient on the risks, benefits, and alternatives of the procedure, as is required to procure informed consent. However, during the counseling session, she withheld information about a risk that she was aware of, but for whatever reason believed did not need to be raised in the discussion. Perhaps the physician believed, based on her exercise of medical knowledge and judgment, that the risk was too remote. *See, e.g., Backlund v. University of Washington,* 137 Wn.2d 651, 668-69, 975 P.2d 950 (1999) (no duty to disclose 1 in 10,000 chance of injury).

The patient consented to the surgery. Unfortunately, there was a complication. The risk that was not discussed prior to the procedure came to fruition. The patient paid for the procedure despite the complication.

The patient then files a lawsuit, claiming correctly that the physician knowingly withheld certain information about risks of the

procedure. The patient claims that she was deceived by the physician by the failure to discuss the risk, and that as a result she paid for the surgery.

With no intent to deceive requirement in the CPA, the Court of Appeals decision below would allow this, and virtually any informed consent claim, to proceed as a CPA claim. This result is inconsistent with the law in Washington as discussed above and in Dr. French's briefing. It is also directly at odds with the legislative policy that prompted the adoption and the recent revision of RCW 7.70. If physicians and their insurers are now forced to routinely defend CPA claims and bear the related risk of an award of attorneys' fees and treble damages, costs related to insurance and health care will not decrease, they will dramatically increase.

Moreover, with a CPA claim based on a garden variety professional error claim, physicians are likely to be defended under reservation of rights, with the insurer taking the position that the claim might be subject to policy exclusions. *See Podiatry Ins. Co. v. Isham,* 65 Wn. App. 266, 270, 828 P.2d 59 (1992) (CPA claims that involve injury to "business or property" excluded from typical medical malpractice insurance coverage). The reality is that, in claims that are routinely defended under reservation of rights, for example construction claims, the defendant has incentive to settle the claim. This is because, in the typical

course, if the claim is settled, the coverage issue evaporates, the insured's personal exposure along with it.

Physicians, however, are subject to mandatory settlement reporting requirements. RCW 18.71.350(1). If a claim is settled on behalf of a physician, there is a near certainty that the Department of Health will investigate. Therefore, physicians who are defended under a reservation of rights face a Hobson's choice: risk personal assets if a potentially uncovered CPA claim goes to trial. Or, settle the claim, and incur attorneys' fees to defend a medical license that has been jeopardized by the settlement. It is also expensive for the Department of Health to review and investigate the additional settlements.

Also, if there is a question of policy coverage obligations, an insurer may file a declaratory judgment action. This increases litigation in our already overburdened court system and increases the personal cost of the litigation tremendously for the physician insured, who will be paying for defense of the declaratory judgment action.

Additionally, if a plaintiff wished to obtain other patients' medical records in an effort to demonstrate public interest impact (capability of repetition), significant privacy interests are at stake. If such discovery were allowed, it would put the physician in the precarious and possibly expensive position of attempting to defend other patients against this

challenge to their privacy. It would also put the physician in the severely prejudicial position of defending multiple patient treatment claims in a single lawsuit. Not only would this increase the costs related to medical malpractice litigation and possibly medical malpractice verdicts, but it would also be unfair to the physician and unwieldy for the court.

IV. CONCLUSION

For the policy, legal, and practical reasons above, WDTL requests that this Court reverse the decision of the Court of Appeals decision below.

DATED this 23rd day of February, 2009.

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Subject: Ambach v. French, WSC Cause No. 81107-5

Dear Mr. Carpenter:

Pursuant to the Court's prior permission, and Commissioner Goff's letter of January 21st, please find attached WDTL's *Amicus Curiae Brief* in the above matter.

I am hereby serving the brief electronically by copy of this message, on counsel for the parties and the Washington State Association for Justice Foundation (formerly "WSTLA Foundation"), all of whom by agreement have accepted this method of service.

Thank you,

Stew Estes
Chair, WDTL Amicus Committee

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